

No. 66.

1833

IN THE
COURT OF QUEEN'S BENCH.

APPEAL SHED.

JAMES HEMPSTED,

(Plaintiff in the Court below.)

RESPONDENTS.

AND

THE HON. LEWIS T. DRUM-
MOND, ET AL.,

(Defendants in the Court below.)

APPELLANT;

APPELLANT'S CASE.

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No. 66.

1858

IN THE

COURT OF QUEEN'S BENCH.

PROVINC
LOWE

In the Court of Queen's Bench.

APPEAL SIDE.

No. 68.

JAMES HEMPSTED,

(Plaintiff in the Court below.)

APPELLANT;

AND

THE HON. LEWIS T. DRUMMOND, ET AL.,

(Defendants in the Court below.)

RESPONDENTS.

APPELLANT'S CASE.

THE Appellant's action was founded upon two promissory notes, one of £100, made by Mr. Drummond and endorsed by Mr. Dunlop, the other of £50 14s. 2d., made by Mr. Dunlop and endorsed by Mr. Drummond. The plea is very special indeed, and contains a number of distinct allegations, not all perfectly reconcilable. The intention of the Defendants in making some of these allegations is not easily perceptible, although it is evident that the plea has been framed generally with the view of allowing the Defendants to take advantage of any question which the nature of the evidence, whatever it might be, could possibly allow them to raise. In substance it would seem to amount to a plea of want or perhaps rather of failure of consideration, with the conclusion of a dilatory plea (if a plea by which the Defendants seek to make the fulfilment of their obligation depend upon the precedent accomplishment by the Plaintiff of his be a dilatory plea,) and of a peremptory exception combined. The Defendants in effect say: "We shall not pay you, unless you first do something you bound yourself to do; and moreover, we shall not pay you at all, because you have not done what you ought to have done, nor could you ever have done it, nor can you now,"—as the Court will perceive by the following abstract of the plea.

The Defendants allege, that on the 28th December, 1855, a sale of certain stock was made by John Crawford to Charles J. Dunlop, one of the Defendants, on his the said Dunlop's behalf, as well as on behalf of the other Defendant—this sale evidenced by the following document:—

"MONTREAL, 28th December, 1855.

"C. J. DUNLOP, Esq.

"Sir,—I have this day sold to you one thousand shares of stock of the "Kingeey Slate Works (paid-up stock), at five shillings per share, payable by your "note endorsed by the Hon. Lewis T. Drummond, at four months date, with interest, "which note I have this day received, and on payment of the said note I bind myself "to execute the necessary transfer of the said shares in the books of the said Company. "It being agreed and understood that I am to hold the said stock in my name until the "said note is matured as a collateral security for the payment of the said note. Provided "the said note be not paid at maturity, I shall be at liberty to sell forthwith the said "stock at the best price obtainable, and appropriate the proceeds thereof to the liqui- "dation of the said note, or so much thereof as the proceeds of the said sale will amount to.

(Signed)

"JOHN CRAWFORD.
"C. J. DUNLOP."

That the note of £250 mentioned in said agreement was paid at maturity, to wit, by the said John Crawford accepting from the said Defendants, in payment thereof, three other promissory notes, amounting in the whole to the sum of two hundred and sixty-seven pounds seven shillings and ten pence currency; and the said Defendants aver, that when the three last mentioned notes fell due, they were duly paid to the said Crawford, excepting the sum of £150 14s. 2d., for which the two notes sued upon were granted by the Defendants to the said John Crawford, by reason of which premises the said two notes sued upon were and are a settlement in part of the first mentioned transaction by the Defendants with the said John Crawford.

And the said Defendants further aver, that in and by virtue of the payment of the said notes, and the same having been accepted and taken by the said John Crawford as aforesaid, the said Crawford in effect waived his right to *forthwith* sell and dispose of the said stock in the event of the *original note* not being paid at the maturity thereof, and in effect was bound and liable to execute at the time of accepting the aforesaid three notes for £267 7s. 10d., a transfer of the aforesaid stock. And the said Defendants aver that the said Crawford was not at the time of the sale of the said stock, nor since that date, nor at present is he or was he proprietor of the said stock or able to transfer the same as he had undertaken to do as aforesaid.

Then follow allegations to the effect that Crawford has frequently been requested since the said notes were accepted by him as aforesaid to execute the necessary transfer but that he hath continually refused to the damage of the Defendants of one thousand pounds currency, the par value of the same. And also, that previous to the maturity of the notes sued upon, and since the same became due the said Defendants notified and warned the said Crawford that the said notes would only be paid on the said Crawford executing the transfer of the said stock as aforesaid.

The remaining allegations, which assert that the Defendants can urge against the Plaintiff all they could have urged against John Crawford, are admitted, and need not be adverted to.

The prayer of the plea is, that it be declared that the Defendants are not liable for the payment of the notes sued upon, unless there be transferred and made over to the name of the defendant Dunlop the aforesaid shares, in due and legal form, on the books of the said Company by the said Crawford, and that inasmuch as the aforesaid Crawford is not now and never hath been, since the aforesaid 28th day of December, 1856, able to fulfil his aforesaid contract, nor hath he done so, that it be declared that the notes sued upon have been obtained by the Plaintiff, without value having been given for them either by the aforesaid Crawford or by any one for him, and that in consequence the action of the Plaintiff be dismissed with costs.

It is to be noticed that no tender of the amount sued for accompanied this plea; that no fraud is alleged to have been committed; and that the solvency of either Crawford or the Appellant remains unquestioned.

The Appellant by his special answer distinctly asserts that under the agreement of the 28th December, 1856, which agreement is admitted to have been the consideration of the note of £250, of which the notes sued upon are a renewal in part, the obligation of Crawford to execute a transfer of the shares in question will only begin after he has been paid in full. That in the meantime he holds the shares as collateral security for the payment of the balance due on said original note of £250, to wit, the £150 14s. 2d., claimed by the action, with power to sell them when he should think proper to do so, and in the manner he should deem most to his advantage, the construction put on the word *forthwith* by the Defendants being totally denied. In other words, that the question as to the execution of the transfer cannot come up until after payment of the amount sued for, when Crawford would become bound to execute the transfer, unless he had sold the shares in the meantime at the best price obtainable, in which latter case the obligation of executing the transfer would resolve itself into that of giving the Defendant Dunlop an account of the sale, at the latter's risks, of the stock in question.

Further, the Appellant in these special answers, claims the benefit of the admission made by the Defendants in their plea to the effect that the £150 14s. 2d. are a balance of the original note of £250, and denies that by taking the three notes alluded to in the plea and the notes sued upon, he has been paid the amount of the original note—the three notes and the two notes having been given him as additional collateral security, and in renewal of the original note. And also denies that thereby he has renounced to his rights under the agreement of holding the stock as collateral security, and of selling it when and where, and in the manner he should deem most conducive to his interests.

The issue having been joined by general Replications filed by the Defendants, the parties went to proof, and at the Enquêtes no evidence was adduced on either side, beyond that which the following admissions afford.

"To save costs, the said Plaintiff and the said Defendants admit that the paper-writing produced by the Defendants with their plea, and being their Exhibit, No. 1, the said paper-writing purporting to contain the terms of a certain agreement mentioned in the pleadings in the cause between John Crawford and the said C. J. Dunlop, and bearing date, the said paper-writing, at Montreal, the 28th December, 1865, really contains the terms of the agreement entered into by and between the said John Crawford and the said C. J. Dunlop, regarding the sale of one thousand shares of the stock of the Kingsley Slate Works on said mentioned day, and that the notes sued upon were given in part satisfaction of the note of two hundred and fifty pounds mentioned in said agreement of twenty-eighth December, one thousand eight hundred and fifty-five, the balance of said two hundred and fifty pounds note having previously been paid."

The only questions, therefore, that could arise under such circumstances, were the following:—

1. Does the word *forthwith* in the agreement imply that Crawford should be obliged to sell the stock the moment the original note matured, whatever the state of the market at that time, and that he could not do so afterwards.

The Appellant trusts that their question will be decided in his favor as one admitting of no difficulty. The words of the agreement are, "I shall be at liberty to sell *forthwith*," and refusing him the right of selling afterwards would be a very extraordinary interpretation indeed of a clause which was evidently inserted for his special benefit.

2. Has the taking, by Crawford, of the three notes alluded to in the plea, and the two notes subsequently sued upon, operated as a novation, making it incumbent upon Crawford to execute the transfer at the time he took the said three notes?

This question, again, must be answered in favor of the Appellant. A novation is never presumed. It must be proved beyond doubt, and the intention of the creditor to change his condition established by the clearest evidence. Mr. Crawford's right was to be paid £250 before he could be called upon in the terms of the agreement to execute a transfer, and there is certainly no reason to suppose that his intention was to make the condition of the agreement hang upon the fate of *that particular note*; and because his debtor could not pay at the appointed time, and he, Crawford, found himself obliged to renew the note, to say that he became obliged, moreover, to dispose of himself of the stock which was his collateral security. If, when the original note matured, Dunlop paid Crawford £100 and renewed for the balance, Crawford discounting the renewal note, it is contended that even in such a case no novation would have been created for the taking of a discount under such circumstances would be nothing more than granting a certain delay for a consideration. The doctrine as to renewals is that a note being a mere promise to pay, the reiteration of the promise can never, between the parties themselves be equivalent to a payment. All the holder of the original note is bound to do, is not to proceed upon it while the renewal note runs, in other words the original note is *suspended* so long as the renewal note has not matured; and if he proceeds upon the original note, he must shew that the renewal note will not affect the debtor. At all events the question of discount cannot possibly come up in this case, there being no proof beyond this, that the notes sued for were given in part renewal of the original note—the balance having been paid.

Even had the original note of £250 been returned to Dunlop, the position of the parties under the agreement would remain unaltered *a fortiori* in this case when Dunlop has neither produced the original note nor attempted to prove that it had ever been returned to him.

Besides, it must be remembered that the Defendants say in their plea, that before the note sued upon matured, they notified Crawford that they would only pay those notes on Crawford's executing a transfer of the stock. Would they have given such a notice had they considered the £250 note absolutely paid? Would they not rather have demanded the immediate delivery of the stock? It is true it is alleged, but it is equally true that there is no evidence, that they did ask the immediate delivery of the stock, and we must conclude that they have not asked it, and, moreover, that they have not asked it because they knew they were not entitled to it.

3. Was Crawford holding the stock as collateral security for the payment of the notes bound to tender it when suing upon the notes.

The Court below was of opinion he was. The appellant submits that the decision is incorrect, and would, if ratified by this Court go to the destruction of a very large class of commercial securities, viz: collateral securities. The importance of the decision in this respect cannot be exaggerated. The Appellant admits that in ordinary cases, and even in cases where the stipulation is that the price will be paid before delivery, the seller seeking to enforce the payment of the purchase money, must tender the thing sold. It is apprehended there would be a material difference if the thing sold were to remain, under the agreement in the hands of the seller, as collateral security; for the only inference to be drawn from such an agreement would be that the parties meant that the thing sold should be considered as having been delivered to the purchaser, and by him re-delivered to the buyer, as *gage* of the payment of the price. In such a case after the re-delivery, the thing sold would be at the risk of the buyer and be his property, only that this property would be in the hands of another, as would be a *gage* for any ordinary debt. The seller would then have a recourse against the *gage*, and the right to obtain a judgment in this case, for instance, for the amount of the notes with a provision that in default of payment he might sell the proceeds in whole or in part to the payment of his debt, with his recourse against the Debtor for any balance that might remain due in case the proceeds of the sale of the *gage* should not be sufficient. In such a case of course, the Creditor could not sell the *gage* without a judgment. It is not clear that a Defendant could obtain more, if so much, upon such an action, than to have it declared that the Plaintiff had a *gage* in his hands as security for his debt, and that the Plaintiff should proceed to sell the *gage* in due course of law before taking in execution any other property of the Debtor.

But in this case the agreement goes much further. Not only is Crawford to hold the stock as collateral security, but he may sell it whenever he thinks fit, and of course without any judgment being necessary. Moreover, he has a perfect right to obtain a judgment upon the notes, and execute such judgment against all the property of his Debtors, reserving the stock as a last resource.

Had the Defendants by their pleas asked for an account of the stock, it is possible the Plaintiff would have been obliged to say what had become of the stock, whether or not he had sold it. But in the present case the Plaintiff was not bound to do more than to deny the right of the Defendants to claim the transfer of the stock as a condition precedent to the payment of the amount of the notes.

At all events, after the notes are paid, the Defendants will have a right to call upon Crawford or upon the Plaintiff for the stock, and he may then shew that he sold it for some nominal price, it having become depreciated and having no longer any value in the market, and give credit to Dunlop for the proceeds of such sale, if any.

But nothing in law could justify the Court below to say without any qualification that the Defendants are entitled, on the payment of the notes to give a transfer of the stock, and that the Plaintiff was bound to offer such transfer in and by his declaration, and the judgment appealed from violates all the principles of law relating to collaterals, than which few principles are more important, more generally acted upon by merchants, and resting upon a sounder basis, and it is impossible to calculate the mischief that would be done to the mercantile community if it were to be confirmed. It would have the effect of disturbing numberless transactions, and destroying the nature of the security upon which these transactions have been entered into; and that for no conceivable reason whatever, for nothing shows that the slightest fraud has been committed, or that there is any reason to suppose that Mr. Crawford will be less able to account for the stock after the notes are paid as before, and that Dunlop will suffer if he be unconditionally condemned.

The only remaining question raised by the Respondents is as to the proof that the stock vested in the hands of Crawford at the time of the sale. The Appellant submits that in the absence of a special allegation of fraud, the agreement must be taken as conclusive evidence upon the point.

The rule in actions on promissory notes is that they are presumed to be for value received, unless the Defendant first makes out a case of fraud or suspicion of fraud.

Moreover, when the Defendant relies on a plea of consideration the *onus probandi* lies on him.

Even had the action been brought upon the agreement it would not have been

necessary for the plaintiff to prove the existence of the stock in the hands of Crawford, much less in this case where the note is to be presumed for value received.

As to the plea of the Defendants, it is perhaps proper to observe that the only thing that could have given it any validity in some respects, would have been the tender of the money.

There is no doubt but the transaction has been an unfortunate one for the Defendants, as the stock is now admitted on all hands to be worthless; but that can be no excuse for the attempt of the Respondent to have the action dismissed upon technical objections, having no foundation in law and saddle the costs of this action upon the Plaintiff. If the intention of the Respondents was to put in issue, the possession of the stock in the hands of Crawford at the time of the sale, they ought to have given the Plaintiff one a more formal notice of their intention than that plea affords.

LAFLAMME, LAFLAMME & BARNARD,

Attorneys for Appellant.

Montreal, October, 1858.